Suriwong International Sdn Bhd v Menteri Kewangan Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-815–11 OF 2022
KAMALUDIN MD SAID, AZMAN ABDULLAH AND AZIZUL AZMI ADNAN JJCA
3 APRIL 2025

Customs and Excise — Duty — Anti-dumping duty — Whether bill of demand issued by Customs for payment of unpaid anti-dumping duty was in accordance with law — Whether importer had deliberately used 'wrong' tariff code to avoid paying anti-dumping duty — Whether there was no ambiguity in which tariff code was rightly applicable — Whether Finance Minister's rejection of importer's application for remission of duty was therefore a straight-forward decision that did not require a reason to be given — Whether importer's judicial review challenge against the imposition of the duty had no merit

The appellant was issued a bill of demand by Customs to pay RM2,156,895.84 in anti-dumping duty in respect of cement fibre sheets it had imported for its business after it was found that it had used a wrong tariff code to evade payment of the duty. Up until June 2016, the appellant had used the tariff code 6811.82 for the import of fibre cement and had paid the anti-dumping duty connected therewith under the Customs (Anti-Dumping Duties) Order 2014. However, a Customs audit on the appellant for the period 1 July 2017 until 31 July 2019 revealed that the appellant had used the tariff code 6811.89 (to which anti-dumping duty did not attach) to import RM6,926,447.77 worth of cement fibre sheets. The appellant applied to the Finance Minister ('FM') for remission of the said duty ('the remission application') but the application was rejected. By way of a judicial review application ('JRA'), the appellant sought to quash the FM's decision rejecting the remission application as well as Customs' decision to impose the anti-dumping duty. The JRA was premised on the grounds, inter alia, that the decisions were unconstitutional and null and void, illegal and tainted with *Wednesbury* unreasonableness. In the JRA, the appellant sought an order directing the FM to revoke Customs' decision to impose the anti-dumping duty. The High Court dismissed the JRA on finding that the bill of demand was in accordance with the law and that there was no duty on the FM to give a reason for rejecting the remission application. In its instant appeal against the High Court's decision, the appellant contended that: (a) the duty claimed in the bill of demand was unlawful having regard to the underlying rationale for the Countervailing and Anti-Dumping Duties Act 1993; and (b) the FM's decision to reject the remission application was procedurally wrong (for not giving a reason for the rejection), in breach of the

rules of natural justice (for failing to accord the appellant an oral hearing) and tainted with *Wednesbury* unreasonableness.

Held, unanimously dismissing the appeal:

(1) The contention that the Customs (Anti-Dumping Duties) Order 2014 was flawed and illegal for not complying with the procedures specified under the Countervailing and Anti-Dumping Duties Act 1993 had to be dismissed as this allegation was raised for the first time in this appeal. The respondents were not afforded the opportunity to answer the allegation by adducing evidence to show that the applicable procedures for consultation had been adhered to. Even though an appellate court could entertain a contention of illegality in an appeal relating to JRA proceedings and even in circumstances where the illegality was not raised in the statement filed pursuant to O 53 r 3(2) of the Rules of Court 2012 ('the ROC') — as was the case here — this must necessarily be predicated on the condition that all necessary evidence relating to that allegation of illegality had already been adduced before the High Court (see para 22).

(2) The contention that Customs (Anti-Dumping Duties) Order 2014 was contrary to the purpose and object of the Countervailing and Anti-Dumping Duties Act 1993 had no merit. A plain reading of the Schedule to the Customs Duties Order 2017 clearly showed that the appropriate tariff code applicable in the instant case was 6811.82, and not 6811.89, and that there was no ambiguity in the construction of the relevant provision (see para 22).

(3) The FM had no duty to provide a reason for the rejection of the remission application because: (a) the refusal to remit was a straight-forward decision in accordance with the law. It was not a situation where the known facts and circumstances pointed to a decision that favoured the appellant. The circumstances of the case did not warrant a deeper and further explanation; and (b) nothing in the record of appeal showed that the appellant had been treated unfairly. The decision by Customs to levy the duty was communicated and explained to the appellant at the very first available opportunity. The FM's decision to reject the remission application was not a 'bolt out of the blue' that called for reasons to be given (see paras 23 & 110).

(4) The appellant had not credibly denied the FM's assertion in his affidavit that he had taken into account all relevant considerations before making his decision. The allegation that the FM had not taken all relevant considerations into account could not properly form the basis of the JRA challenge because it was never raised in the appellant's O 53 r 3(2) of the ROC statement which functioned as pleadings in judicial review proceedings. The grounds of impecuniosity and hardship advanced by the appellant became irrelevant once the FM found (as per his affidavit)

that the appellant's use of the wrong tariff code was not an innocent mistake but a willful act (see paras 24, 120 & 129).

(5) As the amount of duty claimed from the appellant in the bill of demand was in accordance with the law, the FM's decision not to remit any part of that duty could not constitute a disproportionate or inappropriate action (see paras 25 & 140).

(6) The facts of the case did not necessitate an oral hearing. There were in fact no conflicting material contentions as the correctness of the decision of Customs to apply tariff code 6811.82 instead of 6811.89 was entirely a question of the proper construction of the Schedule to the Customs Duties Order 2017. In any case, the allegation that the appellant was denied of an oral hearing was not raised in his O 53 r 3(2) of the ROC statement and hence could not properly be considered by the court (see para 26).

[Bahasa Malaysia summary

Perayu telah diserahkan bil tuntutan oleh pihak Kastam untuk membayar duti anti-lambakan sebanyak RM2,156,895.84 berkenaan dengan kepingan simen gentian yang diimportnya untuk perniagaannya, setelah didapati bahawa perayu telah menggunakan kod tarif yang salah bagi mengelakkan pembayaran duti tersebut. Sehingga Jun 2016, perayu telah menggunakan kod tarif 6811.82 bagi mengimport simen gentian dan telah membayar duti anti-lambakan yang berkaitan dengannya di bawah Perintah Kastam (Duti Anti-Lambakan) 2014. Walau bagaimanapun, audit oleh pihak Kastam ke atas perayu bagi tempoh 1 Julai 2017 sehingga 31 Julai telah mendedahkan bahawa perayu telah menggunakan kod tarif 6811.89 (yang mana duti anti-lambakan tidak dikenakan) untuk mengimport kepingan simen gentian bernilai RM6,926,447.77. Perayu telah membuat permohonan kepada Menteri Kewangan ('FM') untuk peremitan duti tersebut ('permohonan peremitan'), namun permohonan tersebut telah ditolak. Melalui permohonan semakan kehakiman ('JRA'), perayu telah memohon untuk membatalkan keputusan MK yang menolak permohonan peremitan tersebut serta keputusan Kastam yang mengenakan duti anti lambakan. JRA adalah berlandaskan, antara lain, alas an bahawa keputusan itu tidak berperlembagaan dan terbatal dan tidak sah, menyalahi undang-undang dan dicemari dengan ketidakwajaran Wednesbury. Dalam JRA, perayu memohon perintah mengarahkan FM membatalkan keputusan Kastam untuk mengenakan duti anti lambakan. Mahkamah Tinggi menolak JRA apabila atas dapatan bahawa bil tuntutan adalah mengikut undang-undang dan FM tiada kewajipan untuk memberi alasan menolak permohonan peremitan tersebut. Dalam rayuan semasa terhadap keputusan Mahkamah Tinggi, perayu berhujah bahawa: (a) duti yang dituntut dalam bil tuntutan tersebut adalah tidak sah dari segi undang-undang dengan mengambil kira rasional asas bagi penggubalan Akta Duti Timbal Balas dan Anti-Lambakan 1993; dan (b) keputusan FM untuk menolak

permohonan peremitan adalah tidak teratur dari segi prosedur (kerana tidak memberikan alasan bagi penolakan tersebut), melanggar peraturan keadilan semula jadi (kerana gagal memberi peluang kepada perayu untuk didengar secara lisan) dan dicemari dengan ketidakwajaran *Wednesbury*.

Diputuskan, sebulat suara menolak rayuan:

(1) Pendapat bahawa Perintah Kastam (Duti Anti-Lambakan) 2014 adalah cacat dan menyalahi undang-undang kerana tidak mematuhi prosedur yang ditetapkan di bawah Akta Duti Timbal Balas dan Anti-Lambakan 1993 harus ditolak kerana dakwaan ini dibangkitkan buat kali pertama dalam rayuan ini. Responden tidak diberi peluang untuk menjawab dakwaan itu dengan mengemukakan keterangan untuk menunjukkan bahawa prosedur perundingan yang terpakai telah dipatuhi. Walaupun mahkamah rayuan boleh mempertimbangkan hujahan berhubung isu ketidaksahan dalam suatu rayuan yang berkaitan dengan prosiding JRA dan termasuk juga dalam keadaan di mana isu ketidaksahan tersebut tidak dibangkitkan dalam penyataan yang difailkan menurut A 53 k 3(2) Kaedah-Kaedah Mahkamah 2012 ('KKM') — seperti dalam kes ini — ia mestilah tertakluk kepada syarat bahawa segala keterangan yang perlu berhubung dakwaan ketidaksahan tersebut telahpun dikemukakan di hadapan Mahkamah Tinggi (lihat perenggan 22).

(2) Pendapat bahawa Perintah Kastam (Duti Anti-Lambakan) 2014 adalah bertentangan dengan tujuan dan objektif Akta Duti Timbal Balas dan Anti-Lambakan 1993 adalah tanpa merit. Pembacaan secara jelas terhadap Jadual kepada Perintah Duti Kastam 2017 dengan nyata menunjukkan bahawa kod tarif yang sesuai dan terpakai dalam kes ini adalah 6811.82 dan bukannya 6811.89, dan bahawa tiada sebarang kekaburan dalam pentafsiran peruntukan yang berkaitan (lihat perenggan 22).

(3) FM tidak mempunyai kewajipan untuk memberikan alasan bagi penolakan permohonan peremitan kerana: (a) keenganan terhadap permohonan peremitan merupakan suatu keputusan yang jelas dan selaras dengan undang-undang. Ia bukanlah suatu keadaan di mana fakta dan keadaan yang diketahui membawa kepada suatu keputusan yang memihak kepada perayu. Keadaan dalam kes ini tidak memerlukan penjelasan yang lebih mendalam atau lanjut; dan (b) tiada apa-apa dalam rekod rayuan yang menunjukkan bahawa perayu telah dilayan secara tidak adil. Keputusan pihak Kastam untuk mengenakan duti telah dimaklumkan dan dijelaskan kepada perayu pada peluang pertama yang tersedia. Keputusan FM untuk menolak permohonan peremitan tersebut bukanlah suatu kejutan yang memerlukan alasan khusus untuk diberikan (lihat perenggan 23 & 110).

(4) Perayu tidak menafikan secara kukuh penegasan FM dalam afidavitnya

bahawa beliau telah mengambil kira semua pertimbangan yang relevan sebelum membuat keputusannya. Dakwaan bahawa FM tidak mengambil kira semua pertimbangan yang relevan tidak boleh dijadikan asas yang sah dalam cabaran JRA kerana ia tidak pernah dibangkitkan dalam pernyataan A 53 k 3(2) KKM perayu yang berfungsi sebagai pliding dalam prosiding semakan kehakiman. Alasan ketidakmampuan kewangan dan kesusahan yang dikemukakan oleh perayu menjadi tidak relevan sebaik sahaja FM mendapati (seperti yang dinyatakan dalam afidavitnya) bahawa penggunaan kod tarif yang salah oleh perayu bukanlah satu kesilapan yang tidak disengajakan, tetapi merupakan satu perbuatan yang disengajakan (lihat perenggan 24, 120 & 129).

(5) Memandangkan amaun duti yang dituntut daripada perayu dalam bil tuntutan adalah mengikut undang-undang, keputusan FM untuk tidak meremit mana-mana bahagian duti tersebut tidak boleh membentuk tindakan yang tidak seimbang atau tidak wajar (lihat perenggan 25 & 140).

(6) Fakta kes ini tidak mewajarkan pendengaran secara lisan. Malah, tiada percanggahan material yang wujud memandangkan ketepatan keputusan pihak Kastam untuk mengenakan kod tarif 6811.82 dan bukannya 6811.89 sepenuhnya merupakan satu persoalan mengenai tafsiran yang sewajarnya terhadap Jadual kepada Perintah Duti Kastam 2017. Walau bagaimanapun, dakwaan bahawa perayu telah dinafikan hak untuk pendengaran secara lisan tidak pernah dibangkitkan dalam penyataan A 53 k 3(2) KKM 2012 beliau dan oleh yang demikian, tidak boleh dipertimbangkan secara wajar oleh Mahkamah (lihat perenggan 26).]

Cases referred to

Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 KB 223, CA (refd)

Doody v Secretary of State for the Home Department; and other appeals [1993] 3 All ER 92, HL (refd)

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212; [1979] 1 MLRA 143, PC (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590, FC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1; [1999] 3 AMR 3529; [1999] 3 CLJ 65, FC (refd)

Mohamad Hassan bin Zakaria v Universiti Teknologi Malaysia [2017] 6 MLJ 586; [2017] 10 CLJ 36, CA (refd)

Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor

A [2016] 2 MLJ 495, CA (refd)
Perbadanan Pengurusan Sunrise Garden Kondominium v Sunway City (Penang) Sdn Bhd & Ors and another appeal [2023] 2 MLJ 621; [2023] 2 CLJ 333, FC (folld)
R v Army Board of Defence Council, ex parte Anderson [1991] 3 All ER 375, QBD (refd)
B *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308; [1995] 1 CLJ 619, CA (refd)
Regina v Secretary of State for Trade and Industry, ex parte Lonrho Plc; Regina v Same [1989] 1 WLR 525, HL (refd)
C *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487, HC (refd)
Suriwong International v Menteri Kewangan, Malaysia [2023] MLJU 111; [2023] CLJU 126, HC (refd)
D *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; [1987] 1 CLJ 441; [1987] 1 MLRA 68, PC (refd)
Twin Sensation Sdn Bhd v Majlis Mesyuarat Kerajaan Negeri, Negeri Sembilan & Ors [2023] MLJU 321; [2023] 6 AMR 881, HC (refd)
E *Uniqlo (M) Sdn Bhd v Ketua Pengarah Kastam dan Eksais* [2021] 2 MLJ 120, CA (refd)
V Paul Raj Chelladurai v Jabatan Telekom (M) Bhd & Ors [2000] 3 MLJ 652; [2000] 2 AMR 2345; [2000] 4 CLJ 882; [2000] 1 MLRA 726, CA (refd)

F

Legislation referred to

Countervailing and Anti-Dumping Duties Act 1993 ss 5, 20, 25, 25(4)(b), 28, 34(1)
Courts of Judicature Act 1964 s 42(1)
G Customs (Anti-Dumping Duties) Order 2014 Schedule, para 2
Customs Act 1967 ss 11(1), 14A(1), 17(1)
Customs Duties Order 2017 (repealed by Customs Duties Order 2022) Schedule
Federal Constitution arts 5, 8, 96
H Goods and Services Tax Act 2014 s 43
Rules of Court 2012 O 53, O 53 r 3(2)

Appeal from: *Suriwong International Sdn Bhd v Menteri Kewangan, Malaysia & Ors* [2023] MLJU 111 (High Court, Kuala Lumpur)

I

Joshua Kevin (with Leng Wie Mun & Reuben Ong) (Kevin & Co) for the appellant.
Farah Shuhada Ramli (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Azizul Azmi Adnan JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant, Suriwong International Sdn Bhd, commenced judicial review proceedings against the Minister of Finance and representatives of the Royal Malaysian Customs in connection with the imposition on it of Anti-Dumping duty amounting to RM2,156,895.84 (under a bill of demand totalling RM2,195,184.28). At first instance, the application was dismissed by Amarjeet Singh J at the High Court. The appellant appealed against this decision.

[2] After hearing submissions, this court unanimously dismissed the appeal on 5 September 2023. The reasons for our decision are recorded here. Since the date of the decision, our learned brother Kamaludin Md Said JCA has retired, and hence these grounds of judgment have been prepared pursuant to the provisions of s 42(1) of the Courts of Judicature Act 1964.

Material background facts

[3] The appellant is engaged in the trading of building materials. Up until June 2016 it imported fibre cement from a company known as Shera Public Company Ltd using the harmonised system tariff code 6811.82. Under the Customs (Anti-Dumping Duties) Order 2014, such importation was subject to an anti-dumping duty of 31.14%, which was duly paid by the appellant.

[4] From June 2016 onwards, the appellant imported fibre cement from TPI Polene Public Company Ltd ('TPI Polene'). The fibre cement purchased from TPI Polene was imported and declared by the appellant under the tariff code 6811.89. There was no anti-dumping duty applicable on goods imported under this tariff code.

[5] On 3 October 2019 the appellant received a letter from Customs informing it that a post-import audit would be conducted over the appellant. On 7 October 2019 representatives from Customs attended at the premises of the appellant in Seri Mergong Industrial Park in Alor Setar. Documents were given by the appellant to the Customs in stages over the course of that and the following month.

[6] The audit was conducted in respect of the period 1 July 2017 until 31 July 2019. The results of the audit showed that the appellant had imported cement fibre sheets valued at RM6,926,447.77 that it had purchased from TPI Polene and which had been declared under the tariff code 6811.89.

A **[7]** A notice was issued to the appellant on behalf of the director general of Customs on 17 June 2020, for a representative of the appellant to be present at the Customs office in Alor Setar on 24 June 2020. According to Customs, this meeting was for the purpose of explaining to the appellant the preliminary findings of the audit. Mr Kang Chin Tat, the managing director of the B appellant, disputed this, stating that he was only called to provide a statement to assist the Customs in its investigations (para 6 at p 88 of encl 4 in the record of appeal). But as we shall see, the appellant's own letters to the relevant authorities acknowledged that the appellant had explained its position in this meeting.

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[8] A further meeting, described as a round table discussion, was held on 13 August 2020. According to Customs, the final audit findings were presented to the appellant at this meeting. The minutes of the meeting contained an acknowledgment Mr Kang. However, on affidavit, he claimed that he was not D given an opportunity to explain the appellant's position at this round table meeting.

[9] On 27 October 2020, Customs issued to the appellant a bill of demand under s 17(1) of the Customs Act 1967 and s 43 of the Goods and Services Tax E Act 2014. In this bill of demand, the appellant was said to have been found to have committed an offence by using the wrong tariff codes, and was required to pay the sum of RM2,195,184.28, comprising unpaid anti-dumping duties and underpaid goods and services tax. The demand for underpaid goods and services tax was not made the subject of the judicial review application. F

[10] On 3 November 2020, the appellant made an application (E5/140) to the Deputy Minister of Finance II for remission of the anti-dumping duty and goods and services tax imposed by the bill of demand.

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[11] After it had made the application for remission, the appellant wrote to Prime Minister's Office on 8 December 2020 and to the then Senior Minister in the Ministry of International Trade and Industry on 8 March 2021, seeking support for its application for remission.

H

[12] On 17 June 2021, the Ministry of Finance wrote (E5/163) to the appellant informing it that its application remission of duties and taxes had not been approved. On 17 August 2021 another similar letter (E5/180)was written to the appellant. Neither letters contained any reasons as to why the application I was refused.

[13] The appellant's position was that it appointed Samasia Trading, a forwarding agent, to confirm that goods purchased from TPI Polene and imported into Malaysia would not be subjected to anti-dumping tax.

According to the appellant, the Thai Department of Foreign Trade provided confirmation of the harmonised system tariff code that the appellant had used for importing TPI Polene products.

The grounds for judicial review

[14] The O 53 statement filed by the appellant stated the following as the grounds for judicial review.

[15] In respect of the decision by the Ministry of Finance to dismiss the application for remission through its letters of 17 June 2020 and 17 August 2020:

(a) the decision was null and void because it violated arts 5, 8 and/or 96 of the Federal Constitution and was a disproportionate incursion into the right of livelihood and other fundamental rights under such articles;

(b) the decision was tainted with *Wednesbury* unreasonableness, because:

(i) no reasonable minister, similarly circumstanced, would have dismissed the appellant's appeal; and

(ii) the Minister of Finance failed to take into account relevant considerations, namely that the goods imported by the appellant which bore the tariff code 6811.89 were not subject to Anti-Dumping duties under the Customs (Anti-Dumping) Duties Order 2014.

(c) the decision was made in violation of the rule of law and/or without affording the appellant the right to receive reasons as to why its appeals were dismissed;

(d) the decision had frustrated the appellant's legitimate expectations; and

(e) the decision was illegal.

[16] In respect of the decision by the Royal Malaysian Customs to impose Anti-Dumping duty through its bill of demand dated 27 October 2020:

(a) the decision was null and void because it violated arts 5, 8 and/or 96 of the Federal Constitution;

(b) the decision was tainted with *Wednesbury* unreasonableness, because no reasonable director in the position of the second or third respondents would have imposed the anti-dumping duty; and

(c) the decision was illegal.

[17] As a consequence, the appellant sought for:

(a) declarations to the effect that the decision of the Ministry of Finance and the decision by Customs to issue the bill of demand were unconstitutional, null and void;

(b) an order of certiorari quashing the Minister of Finance's decision to dismiss the appellant's appeal; and

(c) orders of mandamus directing the Minister of Finance:

(i) to revoke the decision of Customs to impose the bill of demand; and

(ii) to allow the appellant's appeal of 3 November 2020.

[18] In the submissions before this court, learned counsel for the appellant did not pursue the constitutionality or the legitimate expectation points. We accordingly regarded these as having been abandoned.

The decision of the High Court

[19] The High Court dismissed the appellant's application for judicial review. The learned High Court judge found (the decision of the High Court is reported as *Suriwong International v Menteri Kewangan, Malaysia* [2023] MLJU 111; [2023] CLJU 126), among others, that:

(a) the duty imposed under the bill of demand had been imposed in accordance with the law, and hence that decision could not have been tainted with unreasonableness or illegality; and

(b) in the circumstances of the case, no duty arose on the part of the Minister of Finance to provide reasons for his dismissal of the appellant's appeal of 3 November 2020, because:

> ... the refusal was a straightforward decision and not one that is mired in circumstances that would invite further or deeper rationalisation.

The grounds of the present appeal

[20] The following grounds of appeal were advanced on behalf of the appellant:

(a) that the anti-dumping duty imposed pursuant to the bill of demand was unlawfully imposed having regard to the underlying rationale for the Countervailing and Anti-Dumping Duties Act 1993 and on the basis that the duty had been imposed 'by way of administrative determination and intendment through ambiguous words in a subsidiary legislation'; and

(b) the decision of the Minister of Finance to refuse the appellant's appeal was:

(i) procedurally improper on account of his failure to explain the decision

for the dismissal or refusal of the appeal;

(ii) tainted with *Wednesbury* unreasonableness on account of:

(1) his failure to take into account the four grounds advanced by the appellant in its appeal; and

(2) disproportionality of the imposition of anti-dumping duty, bearing in mind the object of the anti-dumping legislation.

(iii) in breach of the rules of natural justice on account of his contended failure to accord the appellant an oral hearing.

SUMMARY OF THIS COURT'S FINDINGS

[21] The findings of the court in this appeal are summarised in the following paragraphs.

Illegality

[22] Properly understood, the contention of illegality raised by the appellant was two-fold:

(a) the first was that the Customs (Anti-Dumping Duties) Order 2014 was flawed and illegal:

(i) for non-compliance with the procedures specified under the Countervailing and Anti-Dumping Duties Act 1993; and

(ii) because the promulgation of the Customs (Anti-Dumping Duties) Order 2014 failed to take into account the object and purpose of the Countervailing and Anti-Dumping Duties Act 1993.

In our judgment, even though an appellate court may entertain a contention of illegality in an appeal relating judicial review proceedings even in circumstances where the illegality had not been included in the statement filed pursuant to O 53 r 3(2) of the Rules of Court 2012, this must necessarily be predicated on the condition that all necessary evidence relating to that allegation of illegality had been received before the High Court. In this case, because the allegation of non-compliance had only been raised in the appeal, the respondents have not had any opportunity to answer this allegation by adducing evidence to show that the applicable procedures for consultation had been adhered to. This ground of appeal was thus dismissed.

By contrast, the contention at sub-para (ii) above — that the Customs (Anti-Dumping Duties) Order 2014 was contrary to the purpose and object of the Countervailing and Anti-Dumping Duties Act 1993 — was a pure question of law. We are of the view that this contention was not made out. In our judgment, the use of a residual category entitled 'others' in the Customs

(Anti-Dumping Duties) Order 2014 was entirely in accord with the object and purpose of the parent Act (see paras [45]–[59], post);

(b) second, it was contended that the decision by Customs determining that the correct tariff code was 6811.82 was illegal.

In our view, a plain reading of the Schedule to the Customs Duties Order 2017 establishes that the appropriate tariff code was indeed 6811.82 and that there was no ambiguity in the construction of the relevant provision (see paras [60] to [73], post).

The duty to provide reasons

[23] The duty to provide reasons did not arise because:

(a) the decision by the Minister to refuse the appellant's application for remission was a straightforward decision in accordance with law, and not one where the known facts and circumstances pointed to the decision that favoured the appellant. Nor were the circumstances of the case such as would warrant a deeper and further explanation; and

(b) there was nothing in the record of appeal that could be construed as the appellant having been treated unfairly. The decision by Customs had been communicated and explained to the appellant by Customs at the very first available opportunity. The decision by the Minister of Finance to reject the application for remission could not be said to be a bolt out of the blue (see paras [77] to [110], post).

The contended failure to consider relevant facts

[24] We found that the contention of failure on the part of the Minister to consider relevant facts in coming to his decision had not been made out because:

(a) the Minister has himself stated that he taken into account all the relevant considerations, and this averment has not been credibly denied;

(b) in any event, the contention that the Minister had failed to take into account the specific considerations raised in submissions had not been set out in the statement filed by the appellant pursuant to O 53 r 3(2) of the Rules of Court 2012, and hence could not properly form the basis of the appellant's judicial review challenge; and

(c) as a separate and independent finding from sub-paras (a) and (b) above, an examination of the reasons provided by the Minister in his affidavit for his decision revealed that the Minister had in fact taken into account all relevant considerations, because the grounds of impecuniosity and hardship advanced by the appellant became irrelevant once the Minister

found wilful default on its part (see paras [111] to [135], post).

Proportionality

[25] We dismissed the ground of challenge relating to disproportionality because:

(a) the decision by the Minister not to not remit any part of a customs duty that has been properly imposed in accordance with the law cannot constitute a disproportionate action; and

(b) the appellant cannot complain that the demand for short duty was excessive, when the amount claimed was not a single cent more than what it would have had to pay had the correct tariff code been applied and the duty declared at the time of importation (see paras [136] to [142], post).

Denial of the right to an oral hearing

[26] We found that there was no merit in the contention that there had been a denial of the right of the appellant to an oral hearing because:

(a) the facts of the case did not necessitate an oral hearing. In addition, there were in fact no conflicting material contentions, as the correctness of the decision of Customs was entirely a question of the proper construction of the Schedule to the Customs Duties Order 2017; and

(b) the charge that the appellant was not accorded an oral hearing had not been included in the statement that it had filed pursuant to O 53 r 3(2) of the Rules of Court 2012, and hence cannot properly be considered by the court (see paras [143] to [151], post).

[27] The summary in the preceding paragraphs should be read as being subject to the detailed analysis set out in the following paragraphs.

ANTI-DUMPING DUTIES GENERALLY

[28] Anti-dumping duty is a tariff imposed on imported goods that are believed to be priced below fair market value. 'Dumping' describes the situation where a foreign company sells a product in another country at a price lower than the price it charges in its home market, or lower than the cost of production, often made possible by subsidies that the foreign company receives in its home market. 'Countervailing duties' refer to duties that are imposed to offset such subsidies. If unregulated, such practice would be deleterious to the local industry producing similar goods, potentially driving local producers and manufacturers out of business.

[29] Anti-dumping duty is thus imposed on the goods upon its importation into Malaysia to protect local businesses from unfair competition and to maintain fair pricing by discouraging foreign companies from selling goods into Malaysia at artificially low prices. In general, the imposition of anti-dumping duty on particular goods is made pursuant to representations received by the Ministry of International Trade and Industry (now called the Ministry of Investment, Trade and Industry) from local manufacturers and producers.

The Countervailing and Anti-Dumping Duties Act 1993

[30] Under s 20 of the Countervailing and Anti-Dumping Duties Act 1993, the government may initiate an investigation to ascertain whether an allegation of dumping made out. This investigation is initiated following receipt of a petition from the domestic industry producing a similar product to those being imported. The provisions of the Countervailing and Anti-Dumping Duties Act 1993 provides for the steps that must be undertaken in undertaking the investigation, which includes informing the government of the exporting country. If the government eventually comes to an affirmative final determination, the government is empowered by s 25(4)(b) to proceed to impose anti-dumping duties on the subject merchandise imported into Malaysia.

The Customs (Anti-Dumping Duties) Order 2014

[31] Section 34(1) of the Countervailing and Anti-Dumping Duties Act 1993 provides that the Countervailing and Anti-Dumping Duties Act 1993 is to be read as one with the Customs Act 1967. Section 11(1) of the latter Act empowers the Minister of Finance to fix the customs duties to be levied upon goods imported into Malaysia.

[32] The Customs (Anti-Dumping Duties) Order 2014 has been promulgated pursuant to the powers conferred by s 25 of the Countervailing and Anti-Dumping Duties Act 1993 and by s 11(1) of the Customs Act 1967. Paragraph 2 of the Customs (Anti-Dumping Duties) Order 2014 is the operative provision that imposes the applicable duties, which is specified in the Schedule to the Order. The Schedule reads as follows:

SCHEDULE

[Paragraph 2]

ANTI-DUMPING DUTIES

(1) No.	(2) Heading No./ Subheading according to H.S. Code (AHTN Code)	(3) Description of goods	(4) Country	(5) Exporters/Producers	(6) Rate of duty [% of the Cost, Insurance and Freight (CIF)]
1.	6811.82 100 and 6811.82 900 (6811.82.90 10 and 6811.82.90 90)	Cellulose Fibre Reinforced Cement Flat Sheet and Pattern Sheets and specifically excluding external roofing	Thailand	1. Mahaphant Fibre-Cement Public Co. Ltd.	31.14%
				2. The Siam Fibre-Cement Co. Ltd.	9.15%
				3. Conwood Co. Ltd.	Nil
				4. Others	31.14%

[33] It was common ground between the parties that Mahaphant Fibre-Cement Public Co Ltd was the former name of Shera Public Co Ltd from which company the appellant purchased cement fibre sheets, and that the appellant had duly paid the anti-dumping duty of 31.14% imposed on such goods.

[34] From June 2016, the appellant imported cement fibre sheets from TPI Polene. These were declared by the appellant under the tariff code 6811.89. As explained, there was no anti-dumping duty applicable on goods imported under this tariff code.

[35] The result of the post-import audit carried out by the Royal Malaysian Customs indicated that for the period between July 2017 and July 2019, the appellant had imported more than RM6.9m worth of cement fibre sheets from TPI Polene. The Customs formed the view that the appellant had incorrectly applied the tariff code 6811.89 and ought to have applied the tariff code 6811.82 instead. This was because TPI Polene would have come under the category of 'Others' in item 4 of Column 5 in the Schedule to the Customs (Anti-Dumping Duties) Order 2014, as an exporter or producer that was other

A than that specified in items 1 to 3. The applicable anti-dumping duty had not been paid, and the applicable short duty was thus demanded of the appellant through the bill of demand dated 27 October 2020.

B **[36]** The court below found that the imposition of anti-dumping duty in such circumstances was entirely correct, and thus curial intervention was not warranted.

THE CONTENTION OF ILLEGALITY

C **[37]** Learned counsel for the appellant charged the High Court with misunderstanding the appellant's case. According to him, the anti-dumping duty claimed under the bill of demand was unlawfully imposed having regard to the underlying rationale for the Countervailing and Anti-Dumping Duties Act 1993. The precise words used by learned counsel were as follows:

D

> 28. What is disputed in respect of the decision by the 2nd and 3rd Respondents in issuing the Bill of Demand is the fact that the basis of imposition of anti-dumping duty on the import of TPI Polene appears to be on the face of it, unbacked by legislative sanction. Rather, the imposition of such duty was made by way of
>
> E administrative determination and intendment through ambiguous words in a subsidiary legislation.
>
> 29. The decision is thus, as we will presently show, tainted with illegality.

F **[38]** The preliminary point may be made that, although this ground of appeal formed no part of the statement filed by the appellant pursuant to O 53 r 3(2) of the Rules of Court 2012, if the ground of appeal raised related to a contention of illegality on the part of the decision maker, the court possesses a discretion to consider the issue raised if it is in the interests of justice to do so: *Perbadanan Pengurusan Sunrise Garden Kondominium v Sunway City (Penang) Sdn Bhd & Ors and another appeal* [2023] 2 MLJ 621; [2023] 2 CLJ 333 (FC).

G

[39] The second preliminary observation that may be made was that the criticism of the High Court by learned counsel for the appellant was entirely unwarranted when counsel stated that:

H

> 27. At the outset, SISB submits that the fundamental error committed by the Learned High Court judge is the fact that His Lordship had misconstrued/misunderstood SISB's case.

I **[40]** The contention of illegality set out in paras 27 to 56 of learned counsel's submission had in fact never been raised in argument before the High Court. Indeed, this was precisely the reason why it became necessary for the appellant to move this court to amend its memorandum of appeal to include the illegality point. We allowed this application on the basis of the principle in *Perbadanan*

Pengurusan Sunrise Garden v Sunway City.

[41] Judges are of course by no means infallible, but care should be taken by counsel in criticising the decisions of any judge, even in circumstances where an appeal is being mounted against the decision of the judge in question. Criticism must be measured and grounded with a basis in fact or principle. To charge the High Court with misunderstanding a party's case when that argument had not been raised before the High Court could potentially amount to misleading the appellate court. We see no reason why, in the appropriate case, a citation for contempt should not be raised against counsel.

[42] We confess to having had difficulties in parsing the submissions of counsel for the appellant, as many disparate points were intermingled. As we understood it, the submissions raised two distinct points relating to illegality:

(a) the first was that the Customs (Anti-Dumping Duties) Order 2014 was flawed and illegal (among others) for non-compliance with the procedures specified under the Countervailing and Anti-Dumping Duties Act 1993 and because the promulgation of the Customs (Anti-Dumping Duties) Order 2014 failed to take into account the object and purpose of the Countervailing and Anti-Dumping Duties Act 1993 (see para 56 of the appellant's submissions in encl 26 of the appeal record); and

(b) second, it was contended that the decision by Customs to determine that the correct tariff code was 6811.82 was without basis, as there was ambiguity as to which harmonised tariff code applied, in which event the ambiguity should be resolved in favour of the taxpayer (see para 57).

[43] We considered that these two points were distinct, albeit related. The first attacked the legality of the subsidiary legislation enacted by the Minister of Finance under executive fiat. The second attacked the particular decision of Customs to categorise the goods imported under a specific harmonised tariff code.

[44] We address these points in turn.

The legality of the Customs (Anti-Dumping Duties) Order 2014

[45] The Countervailing and Anti-Dumping Duties Act 1993 was enacted pursuant to Malaysia's commitment to the General Agreement on Tariffs and Trade 1994 ('GATT') as a member of the World Trade Organisation ('WTO'). Article VI of GATT sets out the general principles to be applied by a member state in determining whether and to what extent anti-dumping and countervailing duties may be imposed on imports from another member state.

A The Agreement on Implementation of article VI of GATT 1994 (commonly referred to as the 'AD Agreement') is an agreement that binds member states of the WTO and which, as its name suggests, implements the principles in article VI of GATT. It sets forth the substantive requirements that must be fulfilled before a member state may impose anti-dumping measures and also specifies B detailed procedures to be followed regarding (among others) anti-dumping investigations.

[46] The Countervailing and Anti-Dumping Duties Act 1993 substantively implements in Malaysia the requirements of the AD Agreement. C

[47] As explained at para [30] *ante,* under Countervailing and Anti-Dumping Duties Act 1993, once the government receives a petition from a local industry participant, the government may initiate an investigation to D ascertain whether the effect of dumping causes or threatens material injury to an established domestic industry. Before it does so, s 5 requires the government to provide to the government of the exporting country an opportunity for consultation. In effect, the multilateral AD Agreement requires bilateral consultation before the government may impose anti-dumping duty on E products imported from another member state, and this is reflected by the provisions of s 5.

[48] The appellant's first complaint charges that there has been a unilateral imposition of anti-dumping duties, in breach of the scheme of the legislative F framework under the Countervailing and Anti-Dumping Duties Act 1993. Whether or not the process of consultation under s 5 and under article 6 of the AD Agreement has been adhered to is a question of fact, in respect of which no affidavit evidence has been received. This was because the point of illegality was G only raised in the appeal before this court.

[49] For this reason, we are of the view that this particular ground of appeal must necessarily fail. Even though the Federal Court in *Perbadanan Pengurusan Sunrise Garden v Sunway City* has held that an appellate court may entertain a H contention of illegality in an appeal relating judicial review proceedings even in circumstances where the illegality had not been included in the statement filed pursuant to O 53 r 3(2) of the Rules of Court 2012, this must necessarily be predicated on the condition that all necessary evidence relating to that allegation of illegality had been received before the High Court. In this case, I because the allegation that the government had unilaterally imposed Anti-Dumping duty pursuant to the Customs (Anti-Dumping Duties) Order 2014 had only been raised in the appeal, the respondents have not had any opportunity to answer this allegation by adducing evidence to show that the applicable procedures for consultation had been adhered to.

[50] We were not satisfied that, based on the affidavit evidence before us, the appropriate steps prescribed under Countervailing and Anti-Dumping Duties Act 1993 had not been adhered to before the government implemented the final affirmative determination regarding the applicable duties. The somewhat clumsy double-negative formulation of the preceding sentence is necessary to underscore that it was the appellant that bore the evidential burden to prove the allegation of illegality.

[51] Thus, although a court sitting in appeal in judicial review proceedings retains the discretion to address a contention of illegality even in circumstances where the contention of illegality had not been raised in argument before the High Court or been included in the O 53 r 3(2) statement, where necessary facts pertaining to the contention of illegality had not been received by the High Court, that discretion ought not be exercised. Put another way, the contention of illegality can be considered and determined on appeal if all necessary facts were already in evidence, or if the issue turns entirely upon a question of law.

[52] By contrast, the second part of the appellant's attack on the legality of the Customs (Anti-Dumping Duties) Order 2014 was a pure question of law.

[53] The appellant charged that the anti-dumping duty had been imposed 'by way of administrative determination and intendment through ambiguous words in a subsidiary legislation' and that the promulgation of the Customs (Anti-Dumping Duties) Order 2014 failed to take into account the object and purpose of the Countervailing and Anti-Dumping Duties Act 1993.

[54] The relevant passages of the submissions of counsel on this point is reproduced *verbatim* below:

> 49. However, the subject subsidiary legislation, the Customs (Anti-Dumping Duties) Order 2014 [ABOA/Tab 1], indicates at least 2 material aspects as to what fibre cement products are subject to anti-dumping duties:

SCHEDULE

[Paragraph 2]

ANTI-DUMPING DUTIES

(1) No.	(2) Heading No./ Subheading according to H.S. Code (AHTN Code)	(3) Description of goods	(4) Country	(5) Exporters/Producers	(6) Rate of duty [% of the Cost, Insurance and Freight (CIF)]
1.	6811.82 100 and 6811.82 900 (6811.82.90 10 and 6811.82.90 90)	Cellulose Fibre Reinforced Cement Flat Sheet and Pattern Sheets and specifically excluding external roofing	Thailand	1. Mahaphant Fibre-Cement Public Co. Ltd.	31.14%
				2. The Siam Fibre-Cement Co. Ltd.	9.15%
				3. Conwood Co. Ltd.	Nil
				4. Others	31.14%

50. First, whilst the imposition of anti-dumping duties relates to the import of 'Cellulose Fibre Reinforced Cement Flat Sheet and Pattern Sheets and specifically excluding 'external roofing' from Thailand, it appears to apply only to products with HS Codes that begin with Heading Numbers '6811.82'.

51. Second, the rate of duty would differ based on the exporter/producer. It is undisputed that for products imported from Shera, the maximum rate of 31.14% is imposed whilst products imported from The Siam Fibre-Cement Ltd [The Siam], a much lesser rate of 9.15% is imposed. It is also obvious that for the same products under the HS Code imported Conwood Co. Ltd [Conwood], no duty is imposed.

52. The 2nd and 3rd Respondents take the view that fibre cement products imported from TPI Polene fall within the category 'others' where the maximum rate of 31.14% is imposed. The 2nd and 3rd Respondents also contended that SISB had declared the products from TPI Polene under a wrong code '6811.89' when it should have been declared under '6811.82'. It is on that basis the anti-dumping duty is retrospectively charged.

53. With respect, the 2nd and 3rd Respondents' imposition of anti-dumping duty would require a stretch in interpretation of the provisions in the taxation statute and not a straight forward reading therein. It essentially means that taxation on products from TPI Polene is to be made by way of intendment in the following way:

(a) First, products imported from TPI Polene would have to be assumed to categorised under HS Code '6811.82', even though the said company is not expressly listed as a company under the said code;

(b) Second, products imported from TPI Polene would also automatically be assumed to cause the maximum degree of injury (similar to Shera) and further assumed to cause more injury as products imported from The Siam and Conwood since it is imposed the maximum rate of 31.14%.

54. By that logic, any new company from Thailand that imports fibre cement product into Malaysia would now be automatically imposed the maximum anti-dumping duty-even though there could well be no evidence of dumping and no injury caused to local industries. Also, the statutorily provided factors (such as volume, effect, price undertakings) under CADD 1993 that would have to be meticulously considered to determine the impact, injury, and the appropriate value of duty to be imposed on products imported from TPI Polene are now completely bypassed in one fell swoop; with the generic word 'others'.

[55] We do not agree that the inclusion of a residual category would render the Customs (Anti-Dumping Duties) Order 2014 unlawful and contrary to the object and purpose Countervailing and Anti-Dumping Duties Act 1993. The inclusion of a residual category is a frequently used drafting tool typically employed to prevent avoidance behaviour on the part of the persons intended to be regulated. If such a category did not exist, it would be a simple expedient for a foreign producer to incorporate a new entity to undertake production and to escape duties, with the attendant result of the law being in a perpetual state of lag behind unscrupulous and canny producers. That could not be intent of parliament when it enacted the Countervailing and Anti-Dumping Duties Act 1993. In our view, the use of a residual category entitled 'others' in this context would be entirely in accord with the object and purpose of the parent Act.

[56] What is a producer in the position of TPI Polene to do? How would a new producer of the goods avoid the imposition of the highest applicable Anti-Dumping duty?

[57] The AD Agreement provides the answer. Article 11.2 provides for the ability of interested parties (defined in article 6.11 to include a foreign producer and the government of an exporting member state) to request for a review of the anti-dumping duties. Thus TPI Polene could engage the Thai government in order to intercede on its behalf, if it is thought that the duty imposed was excessive and out of proportion to the potential injury to the domestic market. In addition, under the s 28 of the Countervailing and Anti-Dumping Duties Act 1993, an interested party may provide information to the government for the government to undertake an administrative review of the anti-dumping duty imposed.

[58] In support of the contention that Customs had acted unilaterally and in contravention of the object and purpose of the Countervailing and Anti-Dumping Duties Act 1993, counsel for the appellant submitted that the

Department of Foreign Trade of the Government of Thailand had certified that the tariff code used by the appellant to import the TPI Polene products was correct.

[59] We were not persuaded by this argument because:

(a) first, the 'certification' referred to by counsel was the certificate of origin (E6/64), which appears to be a document used for the purposes of exporting goods out of Thailand. It contained a stamp from the Thai Department of Foreign Trade certifying that the exporter's declaration was correct. No evidence was led as to the effect of this certification under the laws of the Kingdom of Thailand; and

(b) second, even if the effect of the certification was to confirm the tariff code used (rather than simply being a procedural form required for the exportation of goods), we cannot see how the certification would operate to bind the Government of Malaysia. There is nothing in the Countervailing and Anti-Dumping Duties Act 1993 or the AD Agreement that appeared to provide for the binding effect of a certification by an exporting member state.

The legality of the assessment by Customs

[60] It was advanced for the appellant that the decision by Customs that the correct harmonised system tariff code was 6811.82 was without basis, as there was ambiguity as to which harmonised tariff code applied. Learned counsel argued that it is an accepted canon of construction for taxing statutes that ambiguities should always be resolved in favour of the taxpayer.

[61] In our view, a plain reading of the Schedule to the Customs Duties Order 2017 establishes that the appropriate tariff code was indeed 6811.82 and that there was no ambiguity in the construction of the relevant provision. We explain our conclusion in the following paragraphs.

[62] The tariff codes for goods to be imported into Malaysia are provided in the Customs Duties Order 2017. Paragraph 4 of the Customs Duties Order 2017 provides that the classification of goods are to be governed by the rules of interpretation under the International Convention on the Harmonized Commodity Description and Coding System. Among these is r 3(a), which provides that the heading in the Schedule to the Order which provides the most specific description shall be preferred to headings providing a more general description.

[63] Of relevance in the present case is the heading bearing the code 68.11 relating to articles of asbestos-cement, cellulose fibre-cement and other similar articles. The relevant portion of the Schedule to the Customs Duties Order 2017 is reproduced below:

68.11		**Articles of asbestos-cement, of cellulose fibre-cement or the like.**			
	6811.40	- Containing asbestos:			
	6811.40.10 00	- - Corrugated sheets	kg	20%	0%
		- - Other sheets, panels, tiles and similar articles:			
	6811.40.21 00	- - - Floor or wall tiles containing plastics	kg	25%	0%
	6811.40.22 00	- - - For roofing, facing or partitioning	kg	10%	0%
	6811.40.29 00	- - - Other	kg	20%	0%
	6811.40.30 00	- - Tubes or pipes	kg	10%	0%
	6811.40.40 00	- - Tube or pipe fittings	kg	20%	0%
	6811.40.50 00	- - Other articles, of a kind used for building construction	kg	20%	0%
	6811.40.90 00	- - Other	kg	10%	0%
		- Not containing asbestos:			
	6811.81.00 00	- - Corrugated sheets	kg	20%	0%
	6811.82	- - Other sheets, panels, tiles and similar articles:			
	6811.82.10 00	- - - Floor or wall tiles containing plastics	kg	25%	0%
	6811.82.20 00	- - - For roofing, facing or partitioning	kg	10%	0%
	6811.82.90 00	- - - Other	kg	20%	0%
	6811.89	- - Other articles:			
	6811.89.10 00	- - - Tubes or pipes	kg	10%	0%
	6811.89.20 00	- - - Tube or pipe fittings	kg	20%	0%
	6811.89.30 00	- - - Other articles, of a kind used for building construction	kg	20%	0%
	6811.89.90 00	- - - Other	kg	10%	0%

[64] Customs has classified the goods in question under the subheading 6811.82, whereas the appellant contended that the goods could equally be classified under the subheading 6811.89.

[65] The appellant is incorrect.

[66] The first determination is whether the fibre boards imported by the appellant contained asbestos. They do not, and hence they do not come under the subheading 6811.40. We then go down the listing to the entry 'Not containing asbestos'. The first item is corrugated sheets. The boards in question were not corrugated, and so we go to the next item, which is 'Other sheets, panels, tiles and similar articles'. Very clearly, the fibre boards in question were sheets or panels, or, at the very least, an article that was similar to a sheet or panel. From the appellant's brochures, the goods were cement-impregnated recycled wood boards of various widths between 2.44 to 3.66 metres in length, used as cladding for buildings, floor skirts, fencing and ceiling, wall and floor

boards. As an article not containing asbestos, not corrugated and formed in sheets, panels, tiles or other similar shape, the applicable subheading was 6811.82.

[67] The subheading 6811.89 refers to 'Other articles', meaning articles that were not corrugated sheets, or other sheets, panels, tiles or similarly shaped articles. The goods in question were very clearly boards, ie an article similar to sheets or panels. Hence they could not come under the description 'Other articles', which included tubes, pipes and their fittings.

[68] The contention that by the appellant that the applicable tariff code ought to have been 6811.89.9000 was clearly and very obviously without merit, as this code would only apply to articles that were not sheets, panels, tiles, articles similar to sheets, panels or tiles, tubes, pipes or fittings for tubes or pipes.

[69] A reading of the plain words of the Schedule to the Customs Duties Order 2017 established that the applicable tariff code was 6811.82, and not 6811.89. The interpretation proposed by learned counsel for the appellant would have required a linguistic contortion that offended not just the rules of statutory construction but also plain common sense.

[70] There was thus no ambiguity that called for a construction that favoured the taxpayer.

[71] The actions by Customs to categorise the goods under the code 6811.82 and to impose anti-dumping duty on the appellant were thus entirely correct and does not attract any need for curial interference. We found no merit in this particular ground of appeal, and so dismissed it.

[72] The appellant argued that Customs did not take any steps to stop the importation of the subject goods on the basis that the wrong tariff code had been used. This, however, did not abate the obligation of the appellant as an importer of goods to ensure that the correct tariff code was declared to Customs. The appellant could have sought, but did not seek, clarification from the Technical Services Division of the Customs on the proper tariff code to be applied.

[73] Customs indisputably has the right to claim for short-paid duty under s 17(1) of the Customs Act 1967. In addition, article 9.3.1 of the AD Agreement specifically anticipates the retrospective assessment of Anti-Dumping duty.

THE CHALLENGE AGAINST THE MINISTERIAL DECISION

[74] The appeal by the appellant to the Minister of Finance invoked the powers of the Minister under s 14A(1) of the Customs Act 1967, which provides for the ability of the Minister to remit the whole or any part of any customs duty imposed, if he considers it just and equitable to do so:

> 14A Minister may remit customs duty, etc
>
> (1) The Minister may, if he thinks it just and equitable to do so, and subject to such conditions as he may deem fit to impose, remit the whole or any part of the customs duty, surcharge, penalty, fee or other money payable under this Act.

[75] The appellant sought to challenge the ministerial decision to dismiss the appellant's appeal on the basis of procedural impropriety, irrationality and disproportionality. It was advanced for the appellant that:

(a) the Minister of Finance had failed to provide reasons as to why the appellant's appeal was dismissed, and hence his decision ought to be set aside on grounds of procedural impropriety;

(b) the decision of the Minister was irrational due to his alleged failure to take into account the four grounds advanced by the appellant in its appeal;

(c) the failure by the Minister to allow the appellant's appeal had resulted in a disproportionate imposition of anti-dumping duty, which warranted curial intervention; and

(d) the Minister had failed to accord the appellant with a right to an oral hearing, which amounted to a breach of natural justice.

[76] Each of these grounds are addressed in turn in the following paragraphs.

The duty to provide reasons

[77] There was no dispute between the parties that a decision of the Minister in an application under s 14A of the Customs Act 1967 is justiciable. The difference of opinion between the respective counsel in this case lay in the question of whether there arose a duty of the Minister to provide reasons for his decision. The decision of the Minister, which was communicated by way of letters dated 17 June 2021 and 17 August 2021, did not contain any reasons.

[78] In an affidavit in opposition affirmed in the course of the judicial review proceedings, Tengku Zafrul bin Tengku Abdul Aziz, the Minister of Finance at the material time, explained the reasons for his decision to refuse the application for remission. We would observe that reasons that have been

provided subsequently and after the judicial review proceedings have been commenced may not properly be taken into account for determining whether the duty to provide reasons has been discharged: *Uniqlo (M) Sdn Bhd v Ketua Pengarah Kastam dan Eksais* [2021] 2 MLJ 120.

[79] It is well established that there is no general duty to give reasons for an administrative decision: see *Doody v Secretary of State for the Home Department; and other appeals* [1993] 3 All ER 92, which was cited with approval by the Court of Appeal in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590. However, a duty to give reasons may arise on a case to case basis and depending on the facts and circumstances surrounding the exercise of a power: *Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor* [2016] 2 MLJ 495. Exceptionally, if the statute expressly provides that no reason need be furnished in the exercise of a power, then such a duty would be precluded. However, the absence of a statutory provision *creating* an obligation to give reasons will not prevent such a duty from arising.

[80] There have been a number of cases where the courts have explained the circumstances under which such a duty would be implied. In *Pembinaan Batu Jaya v Pengarah Tanah dan Galian Selangor,* Abang Iskandar JCA (as His Lordship then was) explained that if a decision was a straightforward one, then no duty would arise, but where it was 'mired in circumstances that would invite deeper rationalisation', then it would become incumbent upon the decision-maker to explain the decision. A near-identical formulation of words was adopted by Balia Yusof JCA in the subsequent case of *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank v Kesatuan Kebangsaan Pekerja-Pekerja Bank.*

[81] In *Pembinaan Batu Jaya v Pengarah Tanah dan Galian Selangor,* the Court of Appeal cited with approval a passage from the judgment of Lord Kinkel in *Regina v Secretary of State for Trade and Industry, ex parte Lonrho Plc; Regina v Same* [1989] 1 WLR 525 stating that an administrative decision may be assailed on grounds of unreasonableness if no reasons for the decision has been provided and where 'all known facts and circumstances appear to point overwhelmingly in favour of a different decision'. This test, to our minds, would apply also in circumstances where the court seeks to determine whether a duty to give reasons has arisen.

[82] It would be instructive to examine some of the cases in which the courts have held that a duty had arisen on the part of a decision-maker to explain its decision. It must however be remembered that each of these cases would have been decided on its own facts. Only the principles discussed in the preceding

paragraphs will constitute authority and precedent, whereas what follows would merely be illustrative of the application of those principles.

[83] In *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 the applicants were found guilty of conduct that contravened the disciplinary rules of Universiti Sains. Edgar Joseph Jr J held that because (among others) the applicants' livelihood were at stake and because of the exercise of reason and intellect are encouraged in a university environment, there arose a duty on the part of the disciplinary authority and the council of the university to give reasons as to why the applicants' defences were rejected, and that breach of this duty entitled the applicants to an order of certiorari.

[84] The Court of Appeal in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, Gopal Sri Ram JCA expressed the view of the court that a duty to give reasons extends to all cases where a fundamental liberty guaranteed by the Federal Constitution has been adversely affected in consequence of an administrative decision. In that case, the respondent had been dismissed by the appellant company after a domestic inquiry, on grounds of an alleged conflict between his personal interests and his duty to the appellant as his employer. He made a representation to the Director General of Industrial Relations, but the Minister of Human Resources decided not to refer the appellant's case to the Industrial Court. The Minister did not provide reasons for not doing so. The Court of Appeal stated:

> In my judgment, as a general rule, procedural fairness, which includes the giving of reasons for a decision, must be extended to all cases where a fundamental liberty guaranteed by the Federal Constitution is adversely affected in consequence of a decision taken by a public decision-maker. Whether a particular right is a fundamental liberty, and therefore falls within the wide encompass of any of the articles under Part II of the Federal Constitution is a question that has to be dealt with on a case by case basis. Suffice to say that the instant appeals are concerned with a fundamental liberty.

[85] In *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1; [1999] 3 AMR 3529; [1999] 3 CLJ 65, the appellant local authority had imposed additional conditions (relating to the pricing of flats to be built) to a previously-granted planning permission and had rejected an appeal by the respondent without giving reasons. This was despite informing the respondent that pricing was an internal matter for the respondent. Edgar Joseph Jr FCJ stated:

> [I]n the exceptional circumstances of this case and having regard to the trend towards increased openness in matters of Government and administration, as a matter of fairness, reasons should have been given by the Council as to why it was imposing the disputed condition and thus resiling from the original approval of planning permission which was free from any pricing condition. In so holding, we

should like to place special stress on the Council's earlier statement, when responding to a plea by members of the Society regarding pricing, that pricing was an internal matter and did not concern it. To put it mildly, the circumstances here were such as to cry out for an explanation from the Council as to its departure from its earlier stance, yet none was vouchsafed to the Society until after proceedings had been commenced in court. That belated explanation, as we have already indicated, left much to be desired.

[86] In *Pembinaan Batu Jaya v Pengarah Tanah dan Galian Selangor,* the appellant received approval for the alienation of a piece of land measuring some 70 acres in 1995. Some 17 years later, the alienation was revoked without reasons given, and the land alienated to someone else. At the time of the revocation, the appellant was on the verge of completing the alienation process and had completed all the required applications and paperwork. The Court of Appeal held that there arose a duty to provide reasons. The case of *Twin Sensation Sdn Bhd v Majlis Mesyuarat Kerajaan Negeri, Negeri Sembilan & Ors* [2023] MLJU 321; [2023] 6 AMR 881 contained similar facts. There, the approval for alienation of a piece of 100-acre land near Tampin was revoked 23 years after it was granted, despite the applicant having undertaken significant steps to apply for planning permission, and despite its having paid the premium for the alienation. The applicant also received no prior indication that the approval would be revoked. The High Court found that the failure to provide reasons for the revocation was a reviewable error.

[87] The appellant in the case of *Mohamad Hassan bin Zakaria v Universiti Teknologi Malaysia* [2017] 6 MLJ 586; [2017] 10 CLJ 36 was an associate professor in the respondent university. He applied for optional retirement. His application, as well as his appeals, were rejected without reasons given. This was despite the appellant's meeting all the requirements for optional retirement and having the support of the respondent's management committee. The Court of Appeal held that these circumstances gave rise to a duty on the part of the respondent to explain why, despite those circumstances, his application was still not approved.

[88] In *Uniqlo (M) Sdn Bhd v Ketua Pengarah Kastam dan Eksais*, the appellant appeared to have fulfilled all the requirements for a special refund of sales tax for goods held on hand, yet its application for the special refund was rejected by Customs without reasons given, despite a subsequent request for the reasons. A duty to provide reasons was held to have arisen in such circumstances.

[89] In *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank v Kesatuan Kebangsaan Pekerja-Pekerja Bank,* the Director General of Trade Unions had proceeded to register the appellant as a trade union when there was already in

existence a national trade union for bank employees, and no explanation was provided for this decision. A duty to provide reasons was held to have arisen. In that case, the Court of Appeal also held that the Director General was under a statutory duty to consult all interested parties, including the National Union of Bank Employees, which he did not do.

[90] *Perbadanan Pengurusan Sunrise Garden v Sunway City* and *Perbadanan Pengurusan Trellises v Datuk Bandar Kuala Lumpur* were two cases involving challenges against the decision of local authorities granting approval for the development of land. In the former case, a duty arose on the part of Majlis Bandaraya Pulau Pinang to provide reasons for the grant of planning permission in circumstances where objections had been heard from interested persons located on adjacent land and where the grant of the planning permission appeared to depart from the structure plan which contained a general policy for the preservation of hill lands and hill slopes.

[91] In the landmark case of *Perbadanan Pengurusan Trellises v Datuk Bandar Kuala Lumpur,* the Federal Court found that the grant of a development order that, among others, deviated from the structure plan for Kuala Lumpur and the use of *gazetted* local plan for Kuala Lumpur that departed significantly from the draft local plan gave rise to a duty to provide reasons.

[92] The applicable principles may be summarised as follows. There is no duty of general application that requires reasons to be given an administrative decision. However, such a duty may arise on a case to case basis and depending on the facts and circumstances surrounding the exercise of a power. Where a statute expressly provides that no reason need be furnished, then effect ought ordinarily be given to such provision and a duty would be precluded from arising. Conversely, the absence of a statutory provision creating an obligation to give reasons will not prevent such a duty from being implied by law. Reasons provided *ex post facto* are to be disregarded by the courts.

[93] If the decision in question was a straightforward one, then no duty to give reasons would arise, but where it was — to utilise the phrase used by Abang Iskandar JCA in *Pembinaan Batu Jaya v Pengarah Tanah dan Galian Selangor* — mired in circumstances that would invite deeper rationalisation, then it would become incumbent upon the decision-maker to explain the decision. Similarly, if all known facts and circumstances appear to point overwhelmingly in favour of one outcome but a different decision was given, then the decision must be explained.

[94] The cases discussed at paras [83] to [91] *ante* provide guidance on some of the factors that have been taken into account by the courts in determining whether a duty to give reasons has arisen. These include:

A (a) the extent to which the decision affects a right of a person, or if a constitutionally-guaranteed right is adversely affected by the decision (such as the liberty of a person);

(b) where the decision represents a departure from a stated policy or from a
B previously published position;

(c) where the applicant appears to have fulfilled all the stated requirements to have a decision given in its favour; and

(d) whether the applicant had been kept abreast of developments in the
C approval process, or if the decision can be regarded as a bolt out of the blue, a decision made without consultation or warning.

[95] The above is, of course, a non-exhaustive list. As explained, each case must be examined on its own merits, and none of the factors may necessarily be
D decisive in any particular case.

[96] The juridical basis of the duty to provide reasons stems from the concept of fairness. In the final analysis, the court is have to ask itself, having regard to all the circumstances of the case, has the applicant been treated
E unfairly by the decision-maker? If no unfairness has arisen by reason of the failure to give reasons, then the remedies prayed for ought rightly be refused.

[97] We now return to the facts of the present case.

F

[98] The position of Customs was that an explanation of the preliminary findings of the post-import audit was given to representatives of the appellant on 24 June 2020, pursuant to a notice issued on behalf of the director general of Customs dated 17 June 2020. The managing director of the appellant,
G Mr Simon Kang Chin Tat, disputed this, stating that he was only called to provide a statement to assist the Customs in its investigations (para 6 at E4/88).

[99] According to Customs, after the audit findings were finalised, a further meeting was held on 13 August 2020, where the findings were presented to the
H appellant. This meeting was described as a round table discussion. The minutes of the meeting contained an acknowledgment from Mr Kang that he understood the issues raised. However, on affidavit, he claimed that he was not given an opportunity to explain the appellant's position at this round table meeting.

I

[100] There was thus a dispute of facts on the affidavits: the position of Customs was that the appellant had been kept abreast of the initial findings, and that there was a further round table discussion in August 2020 before the bill of demand was issued in October. Mr Kang, the appellant's representative,

denied this, stating firstly that we was not informed of the preliminary audit findings and secondly that he was not allowed to explain the appellant's position that the round table discussion, and accordingly it was not a 'discussion' at all.

[101] In a hearing on affidavits, if an assertion of fact is credibly disputed, the court must proceed to hear the case without taking into account the disputed facts: *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; [1987] 1 CLJ 441; [1987] 1 MLRA 68 (PC)). But an assertion should not merely be taken at face value. A court would still be entitled to reject an assertion of fact if it is inconsistent with the deponent's own averments (which is to say that it is self contradictory), if it is vague or equivocal, if it is inconsistent with undisputed contemporaneous documentary evidence or if it is inherently implausible in and of itself: see the decision of the Judicial Committee of the Privy Council on appeal from Malaysia in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212; [1979] 1 MLRA 143.

[102] In this case, Mr Kang's averments were contradicted by the appellant's own letters.

[103] In the appellant's letter to the Deputy Finance Minister II dated 3 November 2020 by which it applied for remission, the appellant referred to the meeting held in June 2020. The material portion of the letter stated as follows:

> Pada tarikh 17 Jun 2020, pihak kastam Kedah menjemput kami ke pejabat kastam bagi sesi taklimat. Pihak kastam berhasrat ingin mengutip semula cukai yang tertunggak selama tempoh 3 tahun kebelakangan berjumlah RM2,195,184.28 dengan menyatakan barangan tersebut adalah terkandung di dalam perintah anti dumping walaupun pihak kami mengishtiharkan [sic] di bawah HS Code 6811.89.9090 walaupun tidak terkandung sepertimana perintah HS Code 6811.82.9000 yang mana dikenakan perintah anti dumping.
>
> Di dalam perbincangan itu *pihak kami menghuraikan terperinci dari permulaan* mengimport barangan tersebut pada 2016, syarikat TPI Polene Public Company adalah sebuah kilang yang baru menghasilkan produk simen fiber. (Emphasis added.)

[104] The letter then proceeded to explain the circumstances of the importation of cement fibre from TPI Polene.

[105] The appellant was thus hoist with its own petard. In its own letter to the Ministry of Finance it admitted to having given a detailed explanation of the circumstances of its case in the June meeting, but yet Mr Kang gave a sworn statement to the effect that he was only called to give a statement to assist in the investigations. It was also clear that the letter contained a further admission

A that Customs had indeed explained the results of its preliminary audit finding, contrary to the assertions by Mr Kang.

[106] There was in evidence another letter (E6/17) from the appellant to the then Senior Minister in the Ministry of International Trade and Industry dated 8 March 2021, which substantially repeated the contents of the application for remission dated 3 November 2020. The appellant had also written to the Prime Minister's Department on 8 December 2020. Although the contents of this letter was not in evidence, the subsequent letter (E5/186) from the Prime Minister's Department dated 23 December 2020 to the Ministry of Finance contained details of the case that clearly could only have been provided by the appellant. This letter also referred to the June 2020 meeting with Customs as a *taklimat,* which reinforced the Custom's position that the appellant had been briefed on the preliminary audit findings.

[107] Mr Kang's averments were not representative of the truth because they were contradicted by the contemporaneous documentary evidence emanating from the appellant itself. We accordingly found that the averments made on behalf of Customs were indeed true: that the appellant had been given an explanation from even before the bill of demand was issued as to why Customs was demanding the short-paid duty. Furthermore, the appellant had been accorded a right to be heard even before the bill of demand was issued.

[108] The duty of the Minister of Finance in an application for remission under s 14A of the Customs Act 1967 is to determine whether it would be just and equitable in the circumstances to grant a remission of the whole or any part of the duty demanded.

[109] We agree with the conclusions of the High Court judge that the refusal was a straightforward decision in accordance with law, and not one where the known facts and circumstances pointed to the decision that favoured the appellant. As explained at paras [60] to [71] *ante,* the incidence of, and liability for, anti-dumping duty could be determined from a plain reading of the Customs (Anti-Dumping Duties) Order 2014 and the Schedule to Customs Duties Order 2017. The circumstances of the case were not such as would warrant a deeper and further explanation.

[110] Furthermore, there was nothing in the record of appeal that could be construed as the appellant having been treated unfairly. The decision by Customs had been communicated and explained to the appellant by Customs at the very first available opportunity. The decision by the Minister of Finance to reject the application for remission was not a bolt out of the blue, that called for reasons to be given.

The contended failure to consider relevant facts

[111] It was advanced for the appellant that the decision by the Minister to refuse the application for remission of customs duty was irrational and tainted with *Wednesbury* unreasonableness due to his alleged failure to take into account the four grounds advanced by the appellant in its appeal. It will be useful to examine the relevant passage in the submissions of counsel for the appellant:

> 104. Further, the Minister had completely disregarded SISB's grounds for appeal. SISB, in gist, proffered 4 grounds in its letter of appeal:
>
> (a) according to the marketing manager of TPI Polene, the certification made by the Department of Foreign Trade of Thailand in the documents prepared by TPI Polene, and SISB's forwarding agent, the correct HS code was used;
>
> (b) the goods imported were in small quantity and the margin of profit was very small;
>
> (c) SISB was not taking advantage to make huge profits; and
>
> (d) if the remission was not granted the company which is not financially sound in view of the Covid-19 pandemic would likely be wound up.

[112] The first observation that may be made is that these four grounds were not set out as discrete grounds of appeal in the appellant's letter of 3 November 2020 (E5/140), but appeared in narrative form. In our view, a reasonable person in the position of the Minister would not have regarded the information being presented as constituting separate grounds being advanced for the application for remission, but merely as providing background information for the application.

[113] Secondly, it may be observed that grounds (b) and (c) were part and parcel of the same point, and hence there could be said to be only three grounds, even if it is accepted that these three points constituted separate and discrete grounds for the application for remission.

[114] The Minister's affidavit in opposition stated that he had examined and considered all relevant facts, information and documents regarding the appellant's application. The relevant passage in the affidavit in opposition stated as follows:

> 7. Saya sesungguhnya menyatakan bahawa saya telah meneliti dan mempertimbangkan segala fakta, maklumat dan dokumen berkaitan mengenai permohonan Pemohon ini.
>
> (E4/46. See also para 15(i) of the same affidavit)

[115] Even though Mr Kang in his affidavit in reply disputed (see para 6 of his affidavit in reply at E4/79) the averments of the Minister, we do not see how what the Minister has stated can be gainsaid. The Minister stated that he considered all relevant information and documents, which would have included, at the very least, the letter of application itself, in which the so-called grounds of the appeal had been set out. Mr Kang has no basis to dispute this. In any event, even if Mr Kang is correct, then what he is suggesting is that the Minister dismissed the application without even having read the letter, which to our minds would be preposterous.

[116] There is, in other words, no credible denial of the statement by the Minister, which would be a circumstance where the court would be entitled regard the Minister's statement as being representative of the truth, as explained at para [101] *ante.*

[117] There is a second and more fundamental reason why this ground of appeal must be dismissed. It is this. This particular ground of appeal, articulated in the manner set out in the submissions of counsel before this court, has not been set out in the statement filed pursuant to O 53 r 3(2) of the Rules of Court 2012.

[118] The challenge on account of the contended failure by the Minister to take into account relevant considerations was expressed in the following manner in para 3(e) of the O 53 r 3(2) statement:

> e. The decision of the 1st Respondent in having to dismiss the Applicant's appeals vide the Ministry of Finance's letters to Suriwong International Sdn. Bhd. dated 17.06.2021 and17.08.2021 failed to take into account relevant considerations namely, the goods imported by the Applicant which bears HS Code. 6811.89.9090 are not subjected to anti-dumping duties under Customs (Anti-Dumping) Duties Order 2014;

[119] The basis for the challenge was thus the correctness of the use by Customs of the relevant tariff code, and not the four grounds set out in the submissions of counsel.

[120] It is trite law that the O 53 r 3(2) statement functions as pleadings in judicial review proceedings, and subject to limited exceptions discussed elsewhere in this judgment, an applicant may not raise a ground for judicial review that had not been included in the statement.

[121] Authority for this principle is provided by the Court of Appeal case of *V Paul Raj Chelladurai v Jabatan Telekom (M) Bhd & Ors* [2000] 3 MLJ 652; [2000] 2 AMR 2345; [2000] 4 CLJ 882; [2000] 1 MLRA 726, where it was held that an applicant's O 53 statement will bind the applicant, in much

the same way that pleadings bind parties to a writ action. In that case, the appellant had been dismissed by his employer for demanding gratification from a businessman in whose premises he had installed a telephone. He raised the argument for the first time before the Court of Appeal that, because the letter of dismissal from the board of directors contained the phrase 'dan lain-lain maklumat yang berkaitan', which implied that the board had taken into account extraneous matters of which he had no notice, the disciplinary proceedings were thus tainted with irregularity. This contention was rejected by the Court of Appeal. Siti Norma Yaakob JCA held:

> In the instant appeal before us, proceedings in the High Court were governed by O 53 of the RHC where only affidavit evidence were relied upon by both sides. Under O 53 r 1(2), the application for leave must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought. Under O 53 r 3(1) no other grounds or relief other than those set out in the statement shall be relied upon at the hearing of the originating motion on its merits.

[122] The appellant should not be permitted to shift the goalposts by arguing unpleaded points, or by raising points not raised before the High Court. We observe that the High Court judge had in fact addressed this particular ground of challenge in the terms that it had been set out in para 3(e) of the O 53 r 3(2) statement. Furthermore, the failure by the appellant to properly articulate its case in the statement has deprived the Minister of the opportunity to specifically address the contentions only now raised in the appeal before us.

[123] In the learned counsel's submissions, he argued that the giving of reasons by the Minister in his affidavit must be disregarded by the court, because these reasons have not been supplied at the time the application for remission was dismissed.

[124] It is important to appreciate the two distinct challenges mounted by the appellant: one was the contention that the Minister had failed to provide reasons for his decision, in contravention of his duty to give reasons. The other was the contended failure by the Minister to take into account relevant considerations.

[125] Reasons that have been provided only in the course of the judicial review proceedings cannot be taken into account in order to discharge the duty to give reasons, as we have explained at para [78] *ante.* But those same reasons, in our view, may validly be taken into account in order to ascertain whether or not the Minister has, for example, overlooked a relevant material consideration. The reasons provided in the affidavit will inform the court as to whether the matters taken into account were relevant, and whether there were relevant considerations not taken into account.

[126] An examination of the affidavit in opposition affirmed by the Minister of Finance will reveal that the Minister had in fact specifically addressed the ground of appeal set out in para 104(a) of counsel's submissions. We remind ourselves that this paragraph of the appellant's submissions stated:

> (a) according to the marketing manager of TPI Polene, the certification made by the Department of Foreign Trade of Thailand in the documents prepared by TPI Polene, and SISB's forwarding agent, the correct HS code was used;

[127] The implication of this statement was that the appellant had in good faith relied upon the declaration made by its forwarding agent, who had in turn relied on certifications provided by the Thai government, and so the consequences of an innocent mistake ought not be visited upon the appellant.

[128] The Minister, however, came to the conclusion that the use of the wrong tariff code was in fact wilful. Paragraph 7(b) of the Minister's affidavit stated as follows:

> (b) Berdasarkan kepada pengikraran kod tarif pengimportan antara pengeluar TPI Polene Public Company Limited dan Shera Public Co. Limited, Pemohon dengan sengaja tidak menggunakan kod tarif yang betul bagi mengelak dikenakan duti anti-lambakan sedangkan jenis dagangan yang diimport merupakan dagangan yang sama iaitu simen fiber;

[129] In our considered judgment, once the Minister had found that the use of the wrong tariff code was not an innocent mistake but rather a wilful act on the part of the appellant, then whatever contentions on the hardship faced by the appellant were no longer relevant considerations, because the appellant was the author of its own misfortune. It cannot point to its own wrong-doing to justify a remission of customs duties. Put another way, the grounds advanced in paras (b), (c) and (d) counsel's submissions became irrelevant.

[130] Our decision on this ground of appeal may thus be summed up in the following manner:

(a) the Minister has himself stated that he considered the all relevant considerations, and this averment has not been credibly denied;

(b) in any event, the contentions that the Minister had failed to take into account specific considerations had not been set out in the statement filed by the appellant pursuant to O 53 r 3(2) of the Rules of Court 2012, and hence cannot be raised in submission; and

(c) as a separate and independent finding from paras (a) and (b) above, an examination of the reasons provided by the Minister in his affidavit for his decision will reveal that the Minister had in fact taken into account all relevant considerations, because the grounds of impecuniosity and

hardship became irrelevant once the Minister found wilful default on the part of the appellant.

[131] Learned counsel for the appellant further argued that the Minister in charge of the economy had written a letter to the Ministry of Finance to intercede on behalf of the appellant, and to support appellant's application for remission. It was suggested that the Minister of Finance did not take into account the views of the Minister in charge of the economy, who according to counsel was 'well equipped with the actual state of how local industries operate vis a vis a particular product'. The submissions of counsel stated:

> In gist, the Minister in charge of economy stated in his letter that SISB had in fact done all it could to verify the correct HS Code and was not procuring much profits. He implored the Minister to consider granting remission, should SISB qualify ...

[132] The letter that counsel referred to was the letter of 23 December 2020 (E5/186), from the private secretary to the Deputy Minister in the Prime Minister's Department to the private secretary of the Minister of Finance. This letter referred to the appellant's letter of 8 December 2020, which for reasons best known only to the appellant, was not exhibited in evidence.

[133] The managing director of the appellant, Mr Kang Chin Tat, stated in his affidavit that the 23 December 2020 letter 'strongly acknowledges that the retrospective imposition on anti-dumping tax against the [appellant] is unjust' (E4/34). However, this averment could not be further from the truth, as the main thrust of the letter was simply for the Ministry of Finance to consider the application for remission.

[134] That this was the case was patent on a plain reading of the letter. It was also clear and obvious that the letter was only repeating what must have been contained in the appellant's letter of 8 December 2020. We say so because the details set out in the 23 December 2020 letter reflected the contents of the appellant's letter to the Senior Minister of the Ministry of International Trade and Industry dated 8 Mac 2021, which itself was substantially similar to the appellant's letter to the Deputy Finance Minister II dated 3 November 2020 by which it had applied for the remission.

[135] In short, the 23 December 2020 letter was not a relevant consideration at all.

Proportionality

[136] It was advanced for the appellant that the decision by the Minister to refuse the application for remission and to endorse the imposition of

Anti-Dumping tax by Customs was disproportionate to the object of the Countervailing and Anti-Dumping Duties Act 1993. The precise challenge against the Minister's decision is best described in learned counsel's own words:

> 116. Is the decision of the Minister proportionate to the object of protecting local industries? We say that the measures taken in the present case are simply far in excess when compared to the nature of the alleged 'wrong declaration'. Not only did the Minister endorse the 2nd and 3rd Respondents' maximum imposition of 31.14% on the pretext of 'others' without considering the actual impact on local industries, the Minister also failed to further consider that SISB is also a local SME seeking to survive in adverse economic climate. The Minister has the power to, at the very least, remit part of the levy. To that end:
>
> (a) SISB and/or its directors had never evaded tax nor committed any wrongdoing in the past. They possessed a clean record;
>
> (b) The anti-dumping duties imposed by the 2nd and 3rd Respondents are excessively burdensome, considering SISB's profit margin is only between 1.75% and 8.45%;
>
> (c) SISB is a SME with a total of 33 employees. The sum of RM2,195,184.28 is an enormous amount of money for a SME. SISB is likely to face severe cashflow problems and/or financial difficulties. It will directly affect the livelihood of the employees under the employment of SISB.
>
> 117. The failure of the Minister to consider the correlation between the object of anti-dumping measures and the impact on a local SME is yet another procedural infirmity.

[137] We observe that, before the High Court, the appellant had sought to argue that the travel ban imposed on its directors was also a disproportionate action on the part of the respondents. This point was not pursued in the present appeal, and hence we regarded it as having been abandoned.

[138] In this case, the demand made by Customs was precisely the amount of short duty remaining unpaid. The appellant's challenge in this case only related to the imposition of anti-dumping duties. It did not challenge the imposition of goods and services tax for the amount of RM38,288.44. This meant that the amount under challenge was RM2,156,895.84. This is precisely 31.14% of the value of short duty goods imported over the audit period, which was RM6,926,447.77.

[139] Thus the amount demanded was exactly the amount anti-dumping duty that the appellant was liable for. Customs does not have any discretion to impose any other amount of duty, and hence no issue arises on the question of the proportionality of the bill of demand itself.

[140] The challenge, as articulated by learned counsel's submission, was against the decision of the Minister to refuse the remission, which was said to be disproportionate. As explained, the duty of the Minister under s 14A of the Customs Act 1967 is to determine whether it would be just and equitable in the circumstances to grant a remission of the whole or any part of the duty demanded. The Minister thus indisputably has a discretion, but this discretion is a limited one in the sense that he may only reduce the duty payable but not increase it. As has been established in paras [60] to [71] *ante,* the imposition of anti-dumping duty by Customs was entirely in accordance with the Countervailing and Anti-Dumping Duties Act 1993 and the Customs (Anti-Dumping Duties) Order 2014, read together with the Customs Duties Order 2017. That being the case, we are of the considered view that the decision by the Minister under s 14A to not remit any part of a customs duty that has been properly imposed in accordance with the law cannot constitute a disproportionate action. The refusal by the Minister to decrease the amount of duty lawfully imposed simply cannot be disproportionate or inappropriate in the circumstances.

[141] The straitened circumstances that the appellant has found itself in was entirely the result of its own actions, which it undertook willingly. It chose to rely on the advice of a tax agent to declare the goods under a different tariff code, knowing full well that it had previously imported similar products under another tariff code that was subject to anti-dumping duty. It chose not to seek clarification from the Technical Services Division of Customs on the proper tariff code to be applied, when it clearly had every opportunity to do so. In our considered judgment, it would not lie in the mouth of the appellant to now complain that the demand for short duty was excessive, when the amount claimed was not a single cent more than what it would have had to pay had the correct tariff code been applied and the duty declared at the time of importation.

[142] This ground of appeal was thus dismissed.

Denial of the right to an oral hearing

[143] It was advanced for the appellant that the Minister of Finance had failed to accord the appellant with a right to an oral hearing, which amounted to a breach of natural justice.

[144] This argument found no favour with the High Court. The learned High Court judge stated — correctly in our view — that there was no absolute right to an oral hearing. As a matter of fairness and in accord with the principle of natural justice, a person must be heard before a decision is made that would adversely affect that person's rights. This is implied as matter of law, in

circumstances where the relevant statute does not expressly provide for a right to be heard. The expression 'heard' is of course used metaphorically, and it does not mean that that person's voice must be perceived by the decision maker through the decision-maker's auditory senses — it simply means that the person must have had an opportunity to put his case before the decision-maker. Thus this right may be satisfied if the person explains his or her position in written form, although there may be cases where the absence of an oral hearing renders the decision susceptible to review: *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308; [1995] 1 CLJ 619. Whether or not an oral hearing is necessary is dependent on the circumstances of each particular case and on the subject matter and nature of the decision to be made. If there are substantial issues of fact that cannot be resolved by way of written evidence, then an oral hearing may be required, unless the conflict of evidence can be resolved simply by the inherent unlikelihood of one or the other version: *R v Army Board of Defence Council, ex parte Anderson* [1991] 3 All ER 375.

[145] On the facts of the present case, the High Court found that the circumstances did not require an oral hearing to be held:

> [50] Back to the facts at hand, it is clear that s 14A(1) of the Customs Act 1967, by its words do not provide for an oral hearing and already provides from its words the right to have its representations considered fairly. The Minister is perfectly entitled to only go on the written representation made vide the letters of appeal. It must be remembered that this is a case where the party is seeking remission on the duty and tax already imposed and it is the applicant who is seeking remission of duty and tax which has become due and payable. The duty of the Minister is to consider on the material placed before it by the applicant and decide whether it is just and equitable that remission ought to be granted or not granted in the circumstances.
>
> [51] Having regard to the nature of the decision and the provisions of s 14A(1) of the Customs Act 1967 the decision can clearly be made based on the written representations and documents presented to the Minister.

[146] We are in total agreement with the learned High Court judge, that the facts of the case did not necessitate an oral hearing.

[147] Learned counsel for the appellant submitted that there were conflicting factual contentions in this case that could only be resolved by way of an oral hearing.

[148] We disagree.

[149] The conflicting factual contentions relate to the correctness of the decision of the Royal Malaysian Customs to apply the tariff code 6811.82 rather than 6811.89, and as we have seen at paras [60] to [71] *ante,* this was

entirely a question of the proper construction of the Schedule to the Customs Duties Order 2017. Whatever else the appellant needed to state in advance of its case have not only been set out in the letter to the Deputy Minister of Finance II of 3 November 2020, but have also been repeated in the appellant's further letters to the Prime Minister's Department dated 8 December 2020 and to the Senior Minister of the Ministry of International Trade and Industry dated 8 March 2021. The appellant complains that it had not been able to properly argue its case, when it had brought to bear upon the decision-maker the full force of its lobbying efforts.

[150] There is another, more fundamental reason why this particular ground of appeal was doomed to failure. The charge that the appellant was not accorded an oral hearing had not been included in the statement that it had filed pursuant to O 53 r 3(2) of the Rules of Court 2012. The principle that the O 53 statement will bind the appellant in much the same way that pleadings bind parties to a writ action has been explained in detail at paras [120] and [121] *ante.*

[151] We have carefully and anxiously examined the O 53 r 3(2) statement filed by the appellant at the High Court, and could not discern any part of it that referred to a contention that the appellant had been denied an oral hearing. There was only one complaint in the nature of a procedural error that was laid against the Minister of Finance, and that was in para 3(g) of the statement relating to the contended failure by the Minister to provide reasons for his decision.

[152] For the reasons set out in this judgment, we dismissed the appeal in its entirety with costs to the respondents.

Appeal dismissed.

Reported by Ashok Kumar